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BEING

REPORTS OF MALAYSIAN AND SINGAPORE CASES DETERMINED IN THE HIGH COURTS, THE FEDERAL COURT OF MALAYSIA, THE COURT OF APPEAL AND THE COURT OF CRIMINAL APPEAL OF SINGAPORE, AND THE PRIVY COUNCIL.

SINGAPORE REPORTS

MOHAMED YUSOFF BIN SAMADI v. ATTORNEY-GENERAL

[O.C.J. (Chua J.) May 16, 1974]
[Singapore — Originating Summons No. 32 of 1974]

Administrative Law — Public Officer acquitted at trial in Magistrate's Court — Whether disciplinary proceedings can be taken against him on same facts — Whether plea of autrefois acquit available — Res judicata — Public Service (Disciplinary Proceedings) Regulations, 1970, regs. 4 & 11 — "Offence" — Meaning of — Federal Constitution, art. 7(2).

Constitutional Law — Disciplinary proceedings — "Double jeopardy" — Federal Constitution, art. 7(2).

The plaintiff, who was a school teacher, had been charged on five charges of using criminal force to four girls in his class to outrage their modesty. He was acquitted on those charges. Subsequently, the Public Service Commission instituted disciplinary proceedings against the plaintiff with a view to his dismissal. The plaintiff was charged with five charges that he abused his position as teacher by outraging the modesty of the same four pupils. He applied for a declaration that regulation 11 of the Public Service (Disciplinary Proceedings) Regulations, 1970 is *ultra vires* article 7(2) of the Federal Constitution, as it applies to Singapore, and that the determination in the Magistrate's Court was a conclusive acquittal and discharge of the plaintiff which constituted issue estoppel or *res judicata,* thus making it improper for the Public Service Commission to proceed on the same charges.

Held: (1) no principle of law precludes a man who has been acquitted or convicted upon a set of facts alleged to constitute an offence being subsequently subjected upon the same facts to disciplinary action by a domestic tribunal;

(2) therefore regulation 11 of the Public Service (Disciplinary Proceedings) Regulations, 1970 is not *ultra vires* article 7(2) of the Federal Constitution;

(3) it was not improper for the Public Service Commission to institute disciplinary proceedings in this case as the exercise by the Public Service Commission of its powers is not by way of punishment but rather to enforce a high standard of propriety and professional conduct;

(4) there was no *res judicata* in this case as the parties were different and the facts were relevant to the accusation of a different character, that is, misconduct.

Cases referred to:-

(1) *R.* v. *Elrington* 121 E.R. 870 at p. 873.
(2) *R.* v. *Miles* (1890) 24 Q.B.D. 423 at p. 438.
(3) *R.* v. *Thomas* [1950] 1 K.B. 26.

ORIGINATING SUMMONS.

Amarjit Singh for the applicant.

Chao Hick Tin (Deputy Senior State Counsel) for the respondent.

Chua J.: The facts leading to this action are shortly as follows. The plaintiff is a teacher in a Malay Primary School. He was charged and tried in the Magistrate's Court on five charges under section 354 of the Penal Code of using criminal force to four girls in his class in the school knowing it to be likely that he would thereby outrage the modesty of those four girls. He was acquitted and discharged in respect of each and every charge without his defence being called.

Subsequently the Public Service Commission instituted disciplinary proceedings under regulation 4 of the Public Service (Disciplinary Proceedings) Regulations, 1970, with a view to the plaintiff's dismissal. The plaintiff was charged with five charges that he abused his position as a teacher by outraging the modesty of the same four pupils.

A Committee of Inquiry was appointed to inquire into the case against the plaintiff. The plaintiff applied for and obtained an order from the High Court staying all further proceedings, until further order, by the Committee of Inquiry and the plaintiff was granted leave to apply for an Order of Prohibition to prohibit the Committee of Inquiry from proceeding further with the disciplinary proceedings against him.

The plaintiff now seeks the following declarations:

"1) a Declaration that Regulation 11 of the Public Service (Disciplinary Proceedings) Regulations, 1970 is *ultra vires* article 7(2) of the Federal Constitution as it applies to Singapore by virtue of the Republic of Singapore Independence Act No. 9 of 1965 and consequently is null and void and of no effect

Alternatively, a Declaration that:

The discretion exercised by the Public Service Commission under Regulation 11 to institute disciplinary proceedings against the applicant is unreasonable and/or in excess or abuse and or improper and or contrary to the principles of natural justice.

2) a Declaration that the determination of the 6th Magistrate's Court Arrest Case No. 172 of 1973 in a conclusive acquittal and discharge of the applicant constitutes issue estoppel *res judicata* and it is improper for the Public Service Commission to proceed on the same charges and allegations of fact or raise substantially the same issues as those determined in the plaintiff's favour."

Counsel for the plaintiff submits that Article 7(2) of the Constitution of Malaysia ((which continues to be in force in Singapore by virtue of section 6(1) of the Republic of Singapore Independence Act, 1965, (No. 9 of 1965)) prohibits any disciplinary action to be taken by the Public Service Commission for the same offences after the plaintiff had been acquitted by the criminal court. He contends that Regulation 11 of the Public Service (Disciplinary Proceedings)

Regulations, 1970, is *ultra vires* Article 7(2) of the Constitution of Malaysia and is therefore null and void.

Article 7(2) of the Constitution of Malaysia reads:

"A person who has been acquitted or convicted of an offence shall not be tried again for the same offence except where the conviction or acquittal has been quashed and a retrial ordered by a court superior to that by which he was acquitted or convicted."

Regulation 11 of the Public Service (Disciplinary Proceedings) Regulations, 1970, provides as follows:

"The Public Service Commission may, where a public officer is acquitted of a criminal charge, consider the record of the proceedings of the court and may, if it is of the opinion that the public officer should be dismissed, reduced in rank or otherwise punished, cause appropriate proceedings to be instituted under these Regulations."

Article 7(2) is a constitutional entrenchment of the pleas of *autrefois acquit* and *autrefois convict*. The argument which counsel for the plaintiff contends for, to put it shortly, is that the plaintiff is entitled to plead *autrefois acquit* as precluding any action being taken by the Public Service Commission.

The first consideration is whether the principle of *autrefois acquit* has any application in the present case. The phrases *"autrefois acquit"* and *"autrefois convict"* are terms of criminal law. The rule which is the basis of the plea of *autrefois acquit* or *convict* was stated by Cockburn C.J. in *R.* v. *Elrington*[1] in these words:

"We must bear in mind the well-established principle of our criminal law that a series of charges shall not be preferred, and, whether a party accused of a minor offence is acquitted or convicted, he shall not be charged again on the same facts in a more aggravated form".

The rule is also stated by Charles J. in *R.* v. *Miles*[2] as follows:

"The principle is that no man shall be placed in peril of legal penalties more than once on the same accusation".

The defence of *autrefois acquit* is, therefore, available in any case where a man is put in peril more than once for offences substantially the same arising from the same act.

In 10 *Halsbury's* Laws of England, 3rd Ed., at page 405 the following passage appears:

"The plea of *autrefois convict* or *autrefois acquit* avers that the defendant has been previously convicted or acquitted on a charge for the same offence as that in respect of which he is arraigned".

The relevant word which requires interpretation in Article 7(2) is "offence". The word is not defined in the Constitution of Malaysia and no definition appears in the Interpretation Act (Cap. 3). Counsel for the plaintiff submits that the misconduct alleged against the plaintiff is an "offence".

The word "offence" in the Penal Code denotes a thing made punishable by the Code or under any other law (section 40). The word is also defined in the Criminal Procedure Code as "any act or omission made punishable by any law". (Section 2).

Significance has to be attached to the word "tried" in Article 7(2). This clearly means trial before a judge according to the laws of the land.

In my view "offence" in Article 7(2) means any act or omission punishable by law.

The charges against the plaintiff before the Committee of Inquiry are for misconduct with outraging the modesty of certain of his girl pupils as the basis for the charges. Professional misconduct is not of itself an offence against the law.

In my view, no principle of law precludes a man who has been acquitted or convicted upon a set of facts alleged to constitute an offence being subsequently subjected upon the same facts to disciplinary action by a domestic tribunal.

For these reasons I am of the view that regulation 11 of the Public Service (Disciplinary Proceedings) Regulations, 1970, is not *ultra vires* Article 7(2) of the Constitution of Malaysia.

Counsel for the plaintiff points out that the plaintiff was informed that the Public Service Commission has decided to institute disciplinary proceedings against him under regulation 4 after the Commission has carefully considered the record of the criminal proceedings before the Magistrate's Court. Counsel says that the plaintiff was acquitted without his defence being called and in law that implies that the prosecution was not even able to establish a *prima facie* case against the plaintiff. He submits that under those circumstances the discretion exercised by the Commission is unreasonable and/or in excess or abuse of the power entrusted to it and or contrary to the principles of natural justice.

At the close of the case for the prosecution the address of counsel for the plaintiff was mainly that there was no corroboration of the evidence of the student complainants and on the danger of accepting the testimony of the complainants without corroboration. The magistrate gave no reasons for acquitting the plaintiff without calling for his defence, but I think it is clear that the plaintiff was acquitted because there was no corroboration of the evidence of the complainants.

In the proceedings before the Committee of Inquiry there is an accusation of misconduct and that, as I have said, is not an offence against the law. In *R.* v. *Thomas*[3] Humphreys J. in giving judgment of the Court of Criminal Appeal said (at page 31): —

"It is not the law that a person shall not be liable to be punished twice for the same act; it has never been so stated in any case, and the Interpretation Act itself does not say so. What section 33 (which is similar to section 41 of our Interpretation Act) says is: 'No person shall be liable to be punished twice for the same offence.' Not only is it not the law that a person shall not be punished twice of the same act, but it never has been the law."

What is prohibited is double punishment for the same offence.

The Committee is not bound by the provisions of the Evidence Act or by any other law relating to evidence but may inform itself on any matter in such manner as it thinks fit (regulation 4(9)). The Committee is not a court of law but a domestic tribunal charged with the duty of inquiring into the conduct of a public officer and submitting a report to the Public Service Commission. I am of the view that the exer-

cise by the Public Service Commission of its powers is not by way of punishment but rather to enforce a high standard of propriety and professional conduct.

I am of the view that the plaintiff is not entitled to the alternative declaration that he is seeking.

I now come to deal with the plea of *res judicata* raised by the plaintiff. In order to support that plea it is necessary to show that the same issues have been previously adjudicated upon between the same parties suing in the same right. In the present case there is neither identity of parties nor of issues.

Counsel for the plaintiff contends that the parties in the criminal trial and the disciplinary proceedings are exactly the same. He says that the complainant in the criminal case was the Ministry of Education and the said Ministry is again the complainant in the disciplinary proceedings and so he argues the real parties in both the criminal case and the disciplinary proceedings are the Ministry of Education and the plaintiff. With due respect to counsel, there is no substance in this submission.

In the criminal trial it was the Public Prosecutor against the plaintiff. The Public Prosecutor has the control and direction of criminal prosecutions.

The Public Service Commission is constituted under Article 73 of the Constitution of Singapore and one of the duties of the Public Service Commission is to dismiss and exercise disciplinary control over public officers. It is the Public Service Commission which enquires into the conduct of a public officer pursuant to regulations 11 and 4 of the Public Service (Disciplinary Proceedings) Regulations, 1970. The Public Service Commission is under the Constitution of Singapore an independent authority, independent of executive control.

So it is clear that the parties in the two proceedings are different.

The prosecution was to determine whether the plaintiff has committed an offence under section 354 of the Penal Code. The disciplinary inquiry is to determine whether the plaintiff has misconducted himself and is fit to continue to be a teacher. So the issues before the Committee are not the same as the issues in the criminal trial. The acquittal of the plaintiff in the criminal proceedings ascertained no facts. The Magistrate was not prepared to act on the uncorroborated evidence of the girls. In my view there is no *res judicata* to prevent an inquiry into some of the essential facts when those facts are relevant to an accusation of a different character *i.e.* misconduct.

For these reasons the Originating Summons of the plaintiff is dismissed with costs.

Action dismissed.

Solicitors: *David Marshall.*

PUBLIC PROSECUTOR v. NEOH BEAN CHYE & ANOR.

[O.Cr.J. (Choor Singh and D'Cotta JJ.) April 24, 1974; C.C.A. (Wee Chong Jin C.J., Winslow and Tan Ah Tah JJ.) August 5, 1974]

[Singapore — Criminal Case No. 26 of 1972; Criminal Appeal No. 9 of 1973]

Criminal Law and Procedure — Murder — Common intention — Whether necessary to prove a common intention to commit the crime actually committed — Plea of accidental death.

Criminal Law and Procedure — Trial — Joint or separate — Application for separate trial.

Evidence — Statement to magistrate under Criminal Procedure Code, s. 123 — Whether admissible against co-accused — Evidence Act, s. 30 — When copy of cautioned statement by an accused person should be furnished to co-accused — Criminal Procedure Code (Cap. 113), Sch. E, r. 9.

Penal Code, ss. 34 and 302 — Murder — Common intention.

The first accused Neoh, and the second accused Lim, were jointly tried for murder in furtherance of a common intention. Lim carried a loaded revolver and both accused entered a "wine shop" in order to rob the proprietor. When the proprietor was about to close the shop, they attempted to rob him, but when he resisted, Lim shot him and both accused ran out. When Neoh was arrested and charged with the murder of the proprietor, he made a cautioned statement to the police and another statement to a magistrate. When Lim, was arrested and charged some months later, he also made a cautioned statement to the police. The accused were separately represented by counsel at the trial. The second accused Lim contended (a) that a separate trial was desirable as Neoh had blamed him for the proprietor's death in his earlier statements and he would therefore be prejudiced and embarrassed in his defence; (b) that his own statement to a police inspector was inadmissible because Neoh's cautioned statement had not been furnished to him before his own statement was taken from him, but only some time afterwards and accordingly there had been a breach of rule 9 of Schedule E of the Criminal Procedure Code; and (c) that his gun had gone off accidentally during a struggle with the deceased proprietor. The first accused Neoh contended (a) that there was no case to answer at the end of the prosecution case as there was no evidence of a common intention to cause the death of the proprietor; and (b) that the proprietor's death was in any event accidental.

Held: (1) the question of joint or separate trials being left to the discretion of the presiding judges who must consider the interests of justice as well as the interests of the prisoners, a joint trial was appropriate in the circumstances, as the charge was one of murder in furtherance of the common intention of both the accused;

(2) there was no requirement in rule 9 of Schedule E of the Criminal Procedure Code that when two persons are arrested and one makes a statement, the other must be supplied with a copy of the first person's statement before any statement can be taken from him. As a copy of the cautioned statement made by the first accused was in fact served on the second accused, there was accordingly no breach of rule 9;

(3) in a criminal prosecution where section 34 of the Penal Code is involved, it is not incumbent on the prosecution to prove that there existed a common intention to commit the crime actually committed; it is sufficient if it is proved there was a common intention between all the persons who committed the criminal act and that the act which constituted the offence charged was done in furtherance of that common intention;

(4) the evidence was sufficient to establish beyond a reasonable doubt that both accused had a common intention not only to rob the deceased but also to use their gun if any resistance was offered; and that in furtherance of that common intention the second accused deliberately shot the deceased to overcome his resistance, with the intention of causing him bodily injury (the gunshot wound), such injury being sufficient